United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

948

No. 21,103

Charles Scott,

Appellant,

v.

United States of America,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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STATEMENT OF QUESTIONS PRESENTED

I. The first question presented is whether the District Court erred in deciding that the Allen charge given by the judge at appellant's trial could not be collaterally attacked pursuant to 28 U.S.C. §2255 on the ground that erroneous instructions to the jury cannot be collaterally attacked, where appellant was deprived of his constitutional rights by reason of the supplemental Allen charge.

II. The second question presented is whether the Allen charge given at appellant's trial was so coercive as to minority jurors that it deprived appellant of his constitutional rights to a fair trial and to a trial by jury.

III. The third question presented is whether under the circumstances of this case, where the jury was not deadlocked, the trial court abused its discretion in giving the Allen charge, thereby depriving appellant of his constitutional rights to a fair trial and to a trial by jury.

SUBJECT REFERENCE

TABLE OF CASES

STATUTES

MISCELLANEOUS

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction over this proceeding pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 967, 28 U.S.C. §2255 (1964). The jurisdiction of this Court to hear this appeal from the proceeding in the District Court is based on the same statute.

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STATEMENT OF THE CASE

Appellant, Charles Scott, and a co-defendant at trial, Harvey Green were indicted for three counts of robbery. The case came to trial before Judge Leonard Walsh and a jury in the United States District Court on June 3, 1963 (Cr. No. 237-63)(Tr. 1). Appellant was represented at trial by Herbert J. Muriel, III, retained counsel.

On June 5, 1963, opposing counsel delivered their closing arguments, the court instructed the jury, and the jury then retired to commence its deliberations at 4:37 P.M. (Tr. 296). At 5:43 P.M., the trial court excused the jury from further deliberations until 10:00 A.M. the next morning (Tr. 298). The next morning (June 6) at 11:57 A.M., the jury sent out the following note to the court:

> Your honor, we request to hear the testimony read of Mr. Sissgold and Mr. Wallingford, both upon direct and cross-examination.
> Signed: Miss J. Kern, Forelady (H. Tr. 1*)

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* Part of the transcript was not prepared until June 28, 1966, when it was prepared at the insistence of appellant's appointed counsel, Thomas Henley. (This will be explained at p. 6, infra). This portion of the transcript will be referred to as "H. Tr."

Government and defense counsel agreed with the court that the jury should be advised that this testimony had not been transcribed and that even if it had been, it would not be proper to allow them to read any particular testimony. (H. Tr. 2).

The court so instructed the jury and they retired for further deliberations. (H. Tr. 3, 4). At 5:25 P.M. that same day, the court advised counsel that it had considered giving the Allen charge and then dismissing the jury until the next morning. Government and defense counsel agreed, the jury was given the supplemental instruction and was excused until 10:00 A.M. the next day, June 7, 1963. (H. Tr. 5-8).

At approximately 12:00 P.M. the next morning the jury returned their verdict, finding appellant guilty as indicted and acquitting the co-defendant, Harvey Green. (2 Tr. 4-6 *). Appellant was sentenced to imprisonment on June 28, 1963 for a period of four to twelve years on each of the three counts, the sentences to run concurrently. Appellant is presently confined in Lorton Reformatory, Lorton, Virginia, where he is serving these sentences.

After trial and verdict, but before sentence, appellant pro se instituted habeas corpus in the District Court (H.C. 276-63). A rule to show cause issued and respondent answered. The rule was discharged and the petition dismissed on July 12, 1963.

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* 2 Tr. refers to the original separate transcript of the proceedings on June 6 and June 7, 1963.

Appellant appealed to this Court from the dismissal of the petition in H.C. 276-63 and from the verdict and judgment in Cr. Case No. 237-63. These appeals, Numbers 18,082 and 18,089, respectively were consolidated and counsel, Mr. Ben I. Melnicoff, was appointed to represent appellant on appeal.

On February 19, 1964, prior to the filing of briefs, appellant pro se filed in this Court a "Motion For Summary Reversal Prior to Opinion By The Court." He requested summary reversal therein because the trial judge had given an Allen charge which he stated had deprived him of a "fair and impartial trial". This was the first instance where appellant made known to the Court his objection to the Allen charge. Appellant also sent a letter to the Clerk of this Court, Mr. Nathan J. Paulson, which was filed on February 19, 1964 in which he requested that his motion for summary reversal be printed as part of the joint appendix. He further advised Mr. Paulson that a copy of his motion had been sent to his appointed counsel, Mr. Melnicoff.

Mr. Paulson wrote appellant a letter on February 21, 1964 in which he acknowledged receipt of appellant's motion and letter, and advised him that he should communicate with his appointed counsel concerning any motions to be filed on his behalf.

On February 24, 1964, Chief Judge Bazelon ordered, sua sponte, that an earlier order on February 17, 1964 be amended to

read: "The entire reporter's transcript of the proceedings in these cases in the District Court, exclusive of the voir dire examination and opening statements of counsel, in the trial proceedings shall be furnished at the expense of the United States."

A transcript of the trial proceedings on June 6 and 7, 1963 was filed by the Official Court Reporter, Miss Dorothy Swect, on March 4, 1964. Miss Sweet certified that she had transcribed the trial proceedings on those two days. (2 Tr. 6). This transcript did not contain the supplemental Allen charge given on that date.

Mr. Melnicoff filed appellant's brief on August 3, 1964. The brief did not contain any reference to the supplemental Allen charge. The case came on for argument and on October 7, 1964 this Court filed a per curiam affirmance in both cases.

Appellant again sought habeas corpus pro se on March 8, 1965. (H. C. 121-65). He alleged in his petition that the giving of the Allen charge and the overnight dispersion of jurors while they were deliberating had deprived him of a fair and impartial trial. An order to show cause was made on March 12, 1965. Respondent answered on March 23, 1965 and, with respect to appellant's contention concerning the Allen charge, simply stated that numerous cases had been decided between the decisions in

the two cited cases where the Allen charge had been upheld. The rule to show cause was discharged and the petition dismissed on April 26, 1965 with no reasons given for this disposition.

Appellant sought leave to appeal in forma pauperis from the dismissal of this petition and this was denied on May 12, 1965. He next sought leave to appeal from this denial on May 26, 1965. This Court entered a per curiam order denying leave to appeal from this denial on June 29, 1965 (Court of Appeals Misc. No. 2587). Petition for rehearing en banc was denied on October 4, 1965 and the United States Supreme Court denied cert. on January 24, 1966.

Appellant next filed pro se a "Motion To Vacate Judgement and Set Aside Sentence, And Writ of Habeas Corpus Ad Testificadum" pursuant to 28 U.S.C. §2255 on February 11, 1966. Mr. Thomas C. Henley was appointed to assist appellant on March 3, 1966.

On June 23, 1966 a meeting was held in the chambers of United States District Judge, Leonard P. Walsh. Trial counsel for the government and the defendant (appellant) in Criminal Case No. 237-63 were present to assist in determining whether an Allen charge was given in that case. It was concluded that such a charge might have been given. Miss Dorothy Sweet, Official Court Reporter in the case, determined that she had not transcribed the supplemental Allen charge that was given on June 6, 1963. Miss Sweet filed a transcript of that charge (see footnote p. 2) on June 28, 1966.

In August of 1966, appellant's appointed counsel, Mr. Henley, spoke on the telephone with appellant's previous counsel on appeal, Mr. Ben I. Melnicoff. Mr. Melnicoff stated that he did not recall whether he knew at the time he was preparing appellant's appeal that an Allen charge had been given at the trial. So far as he was able to recall, he assumed the transcripts of trial filed at the time of the appeal were completed in conformity with the order of the Court of Appeals.

On December 12, 1966 appellant pro se amended his motion of February 11, 1966 by filing a "Motion to Lodge and Consolidate Complaint Presently Pending Before This Court in The Above Entitled Cause of Action." The pro se motions of February 11, 1966 and December 12, 1966 were superceded by an Amended Motion to Vacate Judgment, Set Aside Sentence, and Discharge Defendant From Custody filed by appellant's appointed counsel, Mr. Thomas Henley on February 16, 1967. A Memorandum of Points and Authorities in support of the Motion was filed on the same date. Appellant pro se filed a "Demand For Judgment" on February 20, 1967. A Supplemental Memorandum of Points and Authorities was filed by Mr. Henley on February 24, 1967.

The government, on April 5, 1967, filed its opposition to appellant's §2255 motion. Mr. Henley was given leave to withdraw as counsel on April 19, 1967 and Mr. Edwin Williams was

appointed to assist appellant. On May 24, 1967, Mr. Williams filed a supplement to appellant's amended motion.

At the hearing held on June 9, 1967 before Judge Walsh, testimony was taken and argument made as to appellant's contention as to ineffective assistance of counsel, and for the first time the appellant's Allen charge contention was argued.

On June 19, 1967 Judge Walsh filed Findings of Fact, Conclusions of Law and Order in which he denied appellant's motion. Judge Walsh held that the Allen charge could not be collaterally attacked pursuant to 28 U.S.C. §2255.

This attorney was appointed by this Court on September 25, 1967 to represent appellant in his appeal from the denial of his §2255 motion.

STATUTES INVOLVED

Act of June 25, 1948, ch. 646, 62 Stat. 967, 28 U.S.C. §2255 (1964). Federal custody: Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial of infringement of constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Act of June 25, 1948, ch. 646, 62 Stat. 922, 28 U.S.C. 753 (1964). Reporters.

(b). . . The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter . . ..

STATEMENT OF POINTS

1. The District Court erred in deciding that the supplemental Allen charge given by the judge at appellant's trial could not be collaterally attacked pursuant to 28 U.S.C.* on the ground that erroneous instructions to the jury cannot be collaterally attacked, where appellant was deprived of his constitutional rights by reason of the supplemental Allen charge.

2. The trial court erred in giving an Allen charge that was so coercive as to minority jurors that it deprived appellant of his constitutional rights to a fair trial and to a trial by jury.

3. Under the circumstances of this case, where the jury was not deadlocked, the trial court abused its discretion in giving the Allen charge, thereby depriving appellant of his constitutional rights to a fair trial and to a trial by jury.

SUMMARY OF ARGUMENT

The District Court erred in deciding that the supplemental Allen charge given by the judge at appellant's trial could not be collaterally attacked pursuant to 28 U.S.C. §2255. The Allen charge can be collaterally attacked in this case because the charge deprived appellant of constitutional rights and collateral attack by motion under 28 U.S.C. §2255 is the only effective means to protect appellant's rights. The conviction must be attacked collaterally because the court reporter failed to include the Allen charge in the transcript which had been ordered prepared for appellant's appeal, thus precluding appellate review of the charge.

* 28 U.S.C. § 2255

The Allen charge given by the court at appellant's trial was so coercive as to minority jurors that it deprived appellant of his constitutional rights to a fair trial and a trial by jury. The traditional strength of the jury system has been its independence. This independence is severely compromised when the judge intrudes into the deliberations of the jury, asks the minority jurors to distrust their own views in light of the majority opinion, and expresses his "hope" that they will reach a verdict.

Although our political system is in large part based on the theory of majority decision, our criminal law is grounded on the principle that a man is deemed innocent until proven guilty beyond a reasonable doubt in the minds of twelve of his peers. The Allen charge perverts the unanimous verdict principle by giving significance to the legally irrelevant factor of the majority opinion. The effect of the Allen charge in depriving appellant of his right to a hung jury and a mistrial was reinforced by the trial court's misleading statement that some jury would have to decide this case.

The Allen charge is not an effective instrument of judicial administration, since it causes a multiplication of appeals and collateral attacks by outraged defendants. In these situations, a reviewing court is presented with the

difficult task of determining whether the charge was correctly delivered in the circumstances of each case.

Finally, assuming arguendo, that there may be some justification for additional instructions from the court after a jury has become deadlocked, the giving of the Allen charge before such deadlock has occurred can only distort the reasoning process by stifling the views of the minority jurors for the sake of a verdict.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECIDING THAT THE SUPPLEMENTAL ALLEN CHARGE GIVEN BY THE JUDGE AT APPELLANT'S TRIAL COULD NOT BE COLLATERALLY ATTACKED PURSUANT TO 28 U.S.C. §2255 ON THE GROUND THAT ERRONEOUS INSTRUCTIONS TO THE JURY CANNOT BE COLLATERALLY ATTACKED, WHERE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS BY REASON OF THE SUPPLEMENTAL ALLEN CHARGE.

The purpose of 28 U.S.C. §2255 is to minimize the difficulties encountered in habeas corpus hearings by affording the same rights to the accused in another and more convenient forum. United States v. Hayman, 342 U.S. 205 (1952). Accordingly, the principles applicable to habeas corpus petitions also apply to motions under 28 U.S.C. §2255.

The Supreme Court of the United States in Wayley v. Johnston, 316 U.S. 101, (1942), set forth guidelines as to the kinds of issues that could be raised by habeas corpus petition:

> The issue here (coerced guilty plea) was appropriately raised by the habeas corpus petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. 316 U.S. at 104-105. 1/

1/ It should be noted that the supplemental Allen charge was not included in the record on appeal from appellant's conviction and therefore was not open to consideration and review on appeal by this Court.

Appellant contends that the Allen charge issue raised on this 28 U.S.C. §2255 motion falls within the "exceptional circumstances" set forth in the Wayley case, supra, and therefore should have been decided on the merits by the District Court.

First, the conviction in this case was in disregard of appellant's constitutional rights. The giving of the Allen charge in this case deprived appellant of a fair trial in violation of the Fifth Amendment of the United States Constitution and deprived appellant of his right to trial by jury in violation of the Sixth Amendment of the United States Constitution. (See pp. 18-27, infra.)

In its opposition to appellant's §2255 motion in the court below, the government contends that the issue of erroneous instructions to the jury by the trial judge is not within the scope of collateral attack pursuant to 28 U.S.C. §2255. In the cases cited by the government in support of this proposition,[1/] the courts were unable to find any violation of constitutional rights.

1/ Adams v. United States, 95 U.S. App. D.C. 345, 222 F.2d 45 (D.C. Cir. 1955); Banks v. United States, 258 F.2d 318 (9th Cir.), cert. denied, 358 U.S. 885 (1956); Banks v. United States, 287 F.2d 374 (7th Cir. 1961); United States v. Stevens, 260 F.2d 549 (3rd Cir. 1958).

However, the government failed to mention those cases where the issue of erroneous instructions to the jury was considered on the merits in petitions for habeas corpus.[3] In those cases, constitutional issues were raised and decided on the merits by the courts. Petitioners under 28 U.S.C. §2255 have the same rights as habeas corpus petitioners. United States v. Hayman, supra. The substantive scope of 28 U.S.C. §2255 is the same as that of habeas corpus. Larson v. United States, 275 F.2d 673 (5th Cir. 1960); Black v. United States, 269 F.2d 38 (9th Cir. 1959); Taylor v. United States, 229 F.2d 826 (8th Cir. 1956); Kreuter v. United States, 201 F.2d 33 (10th Cir. 1952). It follows that the issue of erroneous instructions causing deprivation of constitutional rights may be raised by motion under 28 U.S.C. §2255.

Appellant contends that the second requirement set forth in Wayley v. Johnston, supra, that the writ is the only effective means of preserving appellant's rights, has been met in this case. Appellant was denied an opportunity to appeal the supplemental Allen charge given at his trial because the court reporter failed to transcribe that instruction for use in the preparation of appellant's appeal.

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[3] Kenion v. Gill, 81 U.S. App. D.C. 96, 155 F.2d 176 (D.C. Cir., 1946); United States v. LaValee, 279 F.2d 396 (2nd Cir., 1960); Grundler v. State of North Carolina, 283 F.2d 798 (4th Cir., 1960); United States v. Murphy, 187 F.Supp. 395 (D.C. N.D. N.Y. 1960).

Appellant's attorney on appeal, Mr. Melnicoff, was entitled to a complete transcript of the trial proceedings occurring on June 6, 1963 and indeed, under Chief Judge Bazelon's order of February 24, 1964, a complete transcript was supposed to have been furnished. This is precisely the kind of case the Supreme Court of the United States was contemplating when it decided Hardy v. United States, 375 U.S. 277 (1964) (dec. January 6, 1964). There the court held that when counsel appointed in the Court of Appeals to represent an indigent defendant was not counsel at trial, it was necessary that he be furnished an entire transcript of the trial proceedings, including the court's charge to the jury, in order to fulfill his duty of adequate representation.

Mr. Melnicoff was entitled to rely on the reporter's certification that the transcript filed on March 4, 1964 was a complete transcript of the proceedings on June 6, 1963. The certified reporter's transcript is deemed prima facie a correct statement of the testimony taken and proceedings had, 28 U.S.C. §753(b) (1964), cf. Tatum v. United States, 101 U.S. App. D.C. 373, 249 F.2d 129 (D.C. Cir. 1957), cert. denied 356 U.S. 943 (1958), and it is the duty of the District Court to assure that the court reporter complies with the provisions of the reporting statute, 28 U.S.C. §753 (1964). Poole v. United States 102, U.S. App. D.C. 71, 250 F.2d 396 (D.C. Cir. 1957).

Since the supplemental Allen charge was not included in the transcript, appellant's counsel could not and did not raise the issue of the Allen charge before the appellate court. Even if appellant's counsel had known that the Allen charge had been given, without the transcript, the appellate court could not have determined whether that charge contained prejudicial error for the appellate court could not have had the benefit of examining the charge.

It is error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. Parrot v. United States, 314 F.2d 46 (10th Cir. 1963); Fowler v. United States, 310 F.2d 66 (5th Cir. 1962); Stephens v. United States, 289 F.2d 308 (5th Cir. 1961).

If, as the above cases hold, the failure to report a possibly prejudicial portion of the trial proceedings requires a new trial, it follows that where there is a failure to transcribe a possibly prejudicial portion of the trial proceeding, and the transcript of that portion later becomes available after appeal, that portion is a proper subject of attack in a collateral proceeding under 28 U.S.C. §2255.

Surely, this motion under 28 U.S.C. §2255 is the only effective means of preserving appellant's rights within the meaning of the Wayley case, supra. As was set forth in the Statement of the Case, supra, at no time prior to the instant appeal was the Allen charge part of the transcript and before the Court of Appeals. Moreover, not until June 1965, after a special hearing, was it determined that an Allen charge was given and only then did the court reporter find the missing portion of the transcript. Here, as in the Wayley case, the facts relied on are outside the record and their effect on the judgment was not open to consideration and review on appeal. In circumstances such as are here presented a motion under §2255 must be a proper vehicle to raise the issue, for how else can the accused bring the matter to the attention of the court.

II. THE ALLEN CHARGE GIVEN BY THE COURT AT APPELLANT'S TRIAL WAS SO COERCIVE AS TO MINORITY JURORS THAT IT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO A TRIAL BY JURY.

The charge complained of is similar to the charge which was approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492(1896), although there are several expansions on the original language, which will be discussed below. In essence, the charge approved in Allen supra urges the minority to give due consideration to the majority opinion, stresses the importance of a verdict, and urges the jurors to listen to each others opinions.

Since the Allen case was decided, all of the Circuit Courts of Appeal have approved this type of instruction. 100 A.L.R. 2d 171, 182 (1965). However, recently there has been an increasing dissatisfaction with the charge in the federal courts, which has been reflected in a number of sharp dissents[4/] and an unhappy concurrence.[5/] The highest courts in two of the states have rejected the Allen charge as coercive per se.[6/]

Certainly in view of the recent and growing trend this question must be answered. Why is there this increasing dissatisfaction with the Allen charge? It is undoubtedly due to the realization that the Allen charge perverts the traditional function of the jury system in a number of very significant ways.

4/ Huffman v. United States, 297 F.2d 754, 755 (5th Cir.) cert. denied., 370 U.S. 955 (1962); Andrews v. United States, 309 F.2d 127, 129 (5th Cir.), cert. denied, 372 U.S. 946 (1962); Jenkins v. United States, 330 F.2d 220, 221 (D.C. Cir. 1964), rev'd, 380 U.S. 445 (1965).

5/ Thaggard v. United States, 354 F.2d 735, 739 (5th Cir.), cert. denied, 383 U.S. 958 (1966).

6/ State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960). State v. Thomas, 86 Ariz. 161, 342 P. 2d 197 (1959).

The traditional strength of the jury system has been its independence. The jury takes its instructions on the law from the judge, but it alone determines the facts. Huffman v. United States, supra. This independence is compromised when the judge, with all the influence he carries, intrudes into the jury's deliberations and urges the minority to reconsider their doubts for the sake of reaching a verdict. As the Supreme Court said in Starr v. United States, 153 U.S. 614 (1894):

> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. 153 U.S. at 626.

In cases decided since the Allen case, the Supreme Court has evidenced great concern for the possible coercive effect of the judge's communications to the jury after it has begun its deliberations. In Brasfield v. United States, 272 U.S. 447 (1926), the Court held that the trial court's inquiry as to the numerical division of the jury was ground for reversal. In so holding, the Court said,

> Its (the inquiry's) effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. 272 U.S. at 450.

It is difficult to reconcile the Brasfield case with the Allen case, which was decided 30 years earlier. It is hard to see how an inquiry as to the numerical division of the jury can be held coercive as to the minority jurors, when a direct admonition from the judge to the dissenting jurors urging them to reconsider their views in light of their disagreement with the majority, is held to be free from coercion. Appellant contends that the Allen charge is a much clearer case of judicial coercion as to minority jurors than the inquiry as to numerical division.

In Jenkins v. United States, 380 U.S. 445 (1965), the Supreme Court reversed this Court in holding that the trial court's admonition to the jury that "You have got to reach a decision in this case" was coercive. It takes a large degree of sophistication to distinguish that charge from the charge in this case. Here, the judge instructed the jury with these words:

> Some jury, of course, sometime will have to decide this case, and naturally we all hope that this jury will be the jury that will decide the matter. (H. Tr. 7).

It is submitted that a minority juror would have trouble distinguishing between the judge's command that he reach a decision and the judge's "hope" that he reach a decision. Besides being misled by the judge's false statement that some jury will have to decide this case (which will be discussed below), the minority juror is

put in the uncomfortable position of frustrating the judge's "hope", as well as that of the majority of the jury. It is doubtful that the Supreme Court will long continue to draw fine distinctions between the language used, where the coercive nature of the judge's charge is substantially the same. Indeed, the charge approved in the Allen case did not contain any expression of the judge's "hope" that a verdict would be reached.

Although our political system is in large part based on the theory of majority decision, our jury system and criminal law are grounded on a different principle. A man is deemed innocent of a crime until he is proven guilty beyond a reasonable doubt in the minds of 12 of his peers. If only one of the jurors has a reasonable doubt, a verdict of guilty cannot be returned. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950).

The Allen charge impinges upon and distorts the unanimous verdict rule, which is the bedrock of our criminal law. The Allen charge urges the minority to reconsider their views in light of the majority view. Yet, there is no legal significance to the majority opinion in our criminal law. As the 5th Circuit said in Green v. United States, 309 F.2d 852 (5th Cir. 1962),

> ...[T]here is no legal rule that the majority of jurors have better judgment than the minority. There is no legal rule that the minority, merely because they are in the minority should distrust their own judgment. Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority's views

> without full discussion and without regard to the historical rights of a single juror to stick to his conscientious opinion on the case. 309 F.2d at 855.

The charge approved in the Allen case did not sanction advising minority jurors to 'distrust" their own views, yet this statement was contained in the charge in appellant's case, and was approved by this court in Fulwood v. United States, 369 F.2d 960, (D.C. Cir. 1967). Appellant contends that this court was wrong to approve such language in Fulwood, which language even further increases the coercive nature of the Allen charge.

Implicit in the unanimous verdict rule is the possibility of a hung jury and a mistrial. As this court said in Williams v. United States, 119 U.S. App. D. C. 190, 338 F.2d 530 (D.C. Cir. 1964), "a mistrial is as much a part of the jury system as a unanimous verdict". A mistrial from a hung jury is a safeguard to liberty. Huffman v. United States, supra, under our system of conviction by unanimous verdict.

Yet, the Allen charge undermines the right to a hung jury by putting pressure on the minority juror to give in to the majority. In fact, today, judges, in their enthusiasm to obtain verdicts, go beyond the original Allen charge and mislead juries by telling them that the case will eventually be decided by some jury. This occurred in appellant's case when the trial court said that "some jury, of course, sometime will have to decide this case"(H.Tr. 7).

That was not a correct statement of the law. Huffman v. United States, supra, Jenkins v. United States, (D.C. Cir. 1964), supra. Indeed, that statement minimized, if it did not nullify the chance that a minority juror would exercise his right to cause a hung jury. Such a perversion of our jury system and of the original Allen charge should no longer be tolerated.

In the cases upholding the Allen charge, there seems to be an unwritten rationale that this charge is an effective instrument of judicial administration, in that it produces verdicts that otherwise might not be brought by deadlocked juries. Appellant submits that this proposition is grossly invalid. As Judge Wisdom said, in dissenting in Andrews v. United States, supra,

> The Allen charge causes more trouble in the administration of justice than it is worth. Its time-saving merits in the district court are more than nullified by the complications it causes on appeal when the reviewing court must determine whether in the circumstances of a particular case the trial judge applied the charge properly -- in substance and in timing. 309 F.2d at 129.

Appellant contends further that the benefit to judicial administration in fewer hung juries is more than outweighed by the flood of appeals and collateral attacks on the Allen charge by outraged defendants who feel that their rights have been trampled on.

The coercive effect of the Allen charge in this case is highlighted by the speed in which a verdict was returned after the charge was given. The speed with which verdicts are reached after the giving of the Allen charge has given rise to its nicknames: the "dynamite" or "nitroglycerin" charge. The jury had been deliberating only 8-1/2 hours before the charge was given. They were given the charge immediately prior to being dismissed until the next day; two hours after their return the next day the jury handed down its verdict. It has been stated that the fact that the jury's disagreement was of long duration before the instructions, and that the guilty verdict was reached in a relatively short time thereafter, indicated coercion. Peterson v. United States, 213 F. 920, (9th Cir. 1914); Stewart v. United States, 300 F. 769 (8th Cir. 1924).

III. UNDER THE CIRCUMSTANCES OF THIS CASE, WHERE THE JURY WAS NOT DEADLOCKED, THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE ALLEN CHARGE, THEREBY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO A TRIAL BY JURY.

In the Allen case supra, the Allen charge was given when the jury returned to the court for further instructions. 164 U.S. at 501. In the most recent cases in which this court has announced its approval of the Allen charge, [7] the charge was

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7/ Moore v. United States, 120 U.S. App. D.C., 203 345 F.2d 97 (D.C. Cir. 1965); Fulwood v. United States, supra.

not delivered until the jury had reported that it was deadlocked. In Moore v. United States, supra, this court cautioned that "since the charge is potentially coercive, its content and manner of use deserve scrutiny." 345 F.2d at 98.

It is clear from the jury's request to hear again the testimony of two eye-witnesses to the offenses charged against the defendant that this was a close and difficult case for the jury. By their request for this testimony just a few hours before the Allen charge was delivered, it seems probable that the jurors were reasoning among themselves in an attempt to reach a verdict at the time the judge called them back for the supplemental instruction.

Assuming, arguendo, that there may be some justification for additional instructions from the court after a jury has become deadlocked, the giving of the Allen charge before such deadlock has occurred can only distort the reasoning process by stifling the views of the minority jurors, for the sake of a verdict. See Burrup v. United States, 371 F.2d 556, 559 (10th Cir. 1967) (concurring opinion).

Appellant contends that under the circumstances of this case, where the jury had just recently asked to see additional testimony, and where the jury had only been deliberating for 8-1/2 hours that the trial court abused its discretion by

delivering the "potentially coercive" Allen charge. This Court should confine the manner of use of this powerful weapon to situations where it is deemed absolutely necessary -- where the jury is obviously deadlocked. Appellant contends that this is clearly not such a case.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this court reverse the court below with directions to sustain appellant's motion under 28 U.S.C. §2255 to Vacate Judgment Set Aside Sentence and Discharge Defendant From Custody.

Respectfully submitted,

PEYTON FORD
1000 Connecticut Ave.,N.W.
Washington, D. C.

Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,103

CHARLES SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
OSCAR ALTSHULER,
EDWARD T. MILLER,
JAMES E. KELLEY, JR.,
Assistant United States Attorneys.

C.A. 347-66

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the *Allen* charge rendered to the jury was coercive where the language thereof followed that of a charge recently found nonprejudicial and noncoercive by this Court and where the judge gave the charge without being told by the jury that there was a deadlock?

2) Whether the *Allen* issue can be raised by the instant motion under 28 U.S.C. § 2255 where appellant had a prior opportunity to raise the issue on direct appeal from his convictions?

INDEX

TABLE OF CASES

OTHER REFERENCES

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*Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,103

CHARLES SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court denying appellant's motion, filed pursuant to 28 U.S.C. § 2255, to vacate and set aside his sentence in Criminal Case No. 237-63. In that case appellant and one Harvey Green were charged by indictment filed on March 4, 1963, with three counts of robbery arising out of an armed hold-up at Hayes Market, 301 7th Street, Northeast, on February 3, 1963. This appeal challenges the giving of an *Allen*[1] instruction at trial.

[1] *Allen* v. *United States*, 164 U.S. 892 (1896).

Jury trial before Judge Walsh began on June 3, 1963. At 4:37 p.m. on June 5 the jury retired to begin deliberations (Tr. 296).[2] After deliberating until 5:39 p.m. the jury was excused to return at 10:00 a.m. the following morning (Tr. 297-98). At about noon the following day the jury sent Judge Walsh a note requesting that the testimony of two witnesses be read to them. Deliberations were then apparently interrupted for some moments while the jury was recalled and advised that this testimony had not yet been transcribed and that, in any event, it would not be proper to allow the jury to hear any particular testimony. (H. Tr. 1, 3-4). At 5:25 p.m. Judge Walsh informed counsel that he was considering giving the jury the *Allen* charge and then dismissing them until the following day for further deliberations. Counsel for appellant stated he had no objection to this proposal. Counsel for Green had no objection either. The jury was then recalled, given an *Allen* instruction[3] and excused until 10:00 a.m. the following morning. (H. Tr. 5-7). At approximately 12:00 p.m. the next day, June 7, the jury found appellant guilty as indicted and acquitted Green on all counts (2 Tr. 4-6). Appellant was sentenced on June 28, 1963 to concurrent four to twelve year terms of imprisonment on all counts.

Appellant was appointed counsel, Ben I. Melnicoff, Esq., to represent him on appeal from these convictions.[4] On

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[2] "Tr." and "2 Tr." were prepared for appellant's original appeal from his convictions in No. 237-63. "Tr." covers the trial proceedings on June 3, 4 and 5, 1963. "2 Tr." purported to cover the proceedings of June 6 and 7. However, on June 28, 1966, the court reporter was obliged to file an additional transcript, "H. Tr.", which contains the portions of the June 6 proceedings not originally transcribed. This additional transcript contains mainly the *Allen* instruction.

[3] For the text thereof see *infra*, fn. 7.

[4] Prior to sentence appellant instituted a *pro se* habeas corpus proceeding (H.C. 276-63) which was denied below. An appeal from that denial was consolidated with the appeal in Criminal No. 237-63. Mr. Melnicoff represented appellant in the consolidated appeal (this Court's Nos. 18,082 and 18,089).

February 19, 1964, before appellant's brief was due, he filed a *pro se* "Motion for Summary Reversal Prior to Opinion by the Court" in which he requested such reversal because the trial judge had given an *Allen* charge which he stated had deprived him of a "fair and impartial trial."[5] Accompanying the motion was a letter from appellant to the Clerk of this Court, Nathan J. Paulson, Esq., advising that a copy of the motion had been mailed to appellate counsel, Mr. Melnicoff, at 1903 N Street, Northwest. On February 21, 1964, in a letter to appellant, Mr. Paulson acknowledged receipt of the motion and advised appellant to consult with counsel concerning any motions to be filed in his behalf.[6]

The trial transcript was ordered prepared for appeal at the expense of the United States by this Court. However, the transcript actually prepared and filed did not contain the *Allen* charge and the circumstances surrounding its giving on June 6, 1963. This omission was a failure to fully conform with this Court's order for the preparation of the transcript of the trial proceedings. The missing portion of the proceedings of June 6, 1963 was finally prepared in connection with the present motion for colteral relief and was filed on June 28, 1966.

Mr. Melnicoff's brief in Nos. 18,082 and 18,089, filed on August 3, 1964, contained no reference to the *Allen* charge. On October 7, 1964, after argument, this Court affirmed *per curiam* in both cases.

After a hearing on the instant motion held on June 9, 1967, Judge Walsh found as a fact that appellate counsel, Mr. Melnicoff, had "received notice that an *Allen* charge had been given to the jury before it returned a verdict . . . even though the reporter failed to transcribe this

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[5] See "Amended Motion to Vacate Judgment, Set Aside Sentence, and Discharge Defendant from Custody", filed below by appellant on February 16, 1967, p. 2.

[6] Appellant's letter of February 19, 1964, and a copy of Mr. Paulson's reply of February 21 are presently in the Clerk's File in this Court's No. 18,082.

portion of the trial transcript" (Findings of Fact, Conclusions of Law and Order, filed June 16, 1967, p. 2).

STATUTE INVOLVED

Title 28, Section 2255, United States Code, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

SUMMARY OF ARGUMENT

I

Since appellant did not object at trial to the proposal to give an *Allen* charge, to prevail in his instant motion he must demonstrate "plain error." The charge rendered does not differ materially from the one found nonprejudicial and noncoercive by this Court in *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966). That opinion dealt with appellant's objections to the language here employed and recognized that the *Allen* charge serves a useful judicial function. The trial judge was not required to wait for the jury to say they were deadlocked before giving the instruction.

II

Appellant should not be allowed to raise the *Allen* issue by his instant motion under 28 U.S.C. § 2255 because he had an opportunity through counsel to raise that issue on direct appeal from his convictions. Counsel representing him on that appeal was notified by appellant that an *Allen* charge had been given and easily could have secured the missing portion of the trial transcript which contained the charge if he had wanted to raise the issue. Collateral attack is not needed to provide an effective means to protect appellant's rights on the issue.

ARGUMENT

I. The *Allen* charge rendered to the jury was not coercive under the circumstances of this case.

(H. Tr. 6-7)

A. *The charge here followed the language of an* Allen *charge recently found nonprejudicial and noncoercive by this Court.*

Appellant contends that the *Allen* charge here given was so coercive of minority jurors as to deprive him of his constitutional rights. Since defense counsel at trial stated that he had no objection to an *Allen* charge, appellant must now demonstrate "plain error" within the context of Rule 52(b), Fed. R. Crim. P. *Kent* v. *United States*, 119 U.S. App. D.C. 378, 343 F.2d 247 (1965), *rev'd on other grounds*, 383 U.S. 541 (1966). *Andrews* v. *United States*, 309 F.2d 127 (5th Cir. 1962). *United States* v. *Furlong*, 194 F.2d 1 (7th Cir. 1951). See *Bord* v. *United States*, 76 U.S. App. D.C. 205, 133 F.2d 313, *cert. denied*, 317 U.S. 671 (1942); Rule 30, Fed. R. Crim. P.

We submit that the language of the charge here given does not differ in any material respect from and in fact parallels exactly the language of the charge found by this Court to be nonprejudicial and noncoercive in *Fulwood* v.

United States, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966).[1] There, as here, appellant objected to the judge's

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Fulwood

"That, while the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure a unanimous verdict by comparison of views, and by arguments or discussions among the jurors themselves. Every juror should listen with deference to the argument of the other jurors, and with a distrust of his own judgment or her own judgment, if he or she finds the large majority of the jury takes a different view of the case from that which the juror holds.

No juror should go to the jury room with a blind determination that the verdict should represent his or her opinion of the case at that particular moment, that is at the termination of the case. Or that he or she should close their ears to the arguments of the other jurors who are equally honest and equally intelligent as themselves.

Accordingly, although the verdict must be the verdict of each of the individual jurors and not a mere acquiescence in the conclusion of your fellow jurors, nevertheless, you should examine the issues submitted to you with an open mind and with candor and with a proper regard and deference to the opinion of each of the others.

It is your duty to decide the case, if you can conscientiously do so, and you should listen to

Scott

. . . while the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure a unanimous verdict by comparison of views and by arguments among the jurors themselves.

Every juror should listen with deference to the arguments of the other jurors and with a distrust of his own or her own judgment, if he finds the large majority of the jury takes a different view of the case from that which he or she takes.

No juror should go to the jury room with a blind determination that the verdict should represent his or her opinion of the case at that particular moment; or that he should alone, or she alone, close their ears to the arguments of the other jurors who are equally honest and intelligent; accordingly, although the verdict must be the verdict of all the jurors and not be a mere acquiescence in the conclusion of your fellow jurors, nevertheless you should examine the issues submitted to you with proper regard and deference to the opinion of each other.

It is your duty to decide the case if you can conscientiously do so, and you should listen to each other's arguments with a disposition to be convinced.

If much the larger number of jurors are for conviction, a dis-

[Continued on page 7.]

statement at one point that a juror should "distrust" his judgment if he finds the large majority takes a different view. The Court said:

> This may be viewed as slightly slightly stronger than the phraseology of *Allen* ("consider whether his doubt was a reasonable one") but it is not enough of a difference to require reversal, especially since it was followed by a precise repetition of the *Allen* phraseology. 369 F.2d at 962-963.

The *Fulwood* Court specifically considered the effect of the judge's concluding statement there that "some jury some

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[Continued]

each other's arguments with a disposition to be so convinced.

If much the larger number of jurors are for acquittal, a dissenting juror should consider whether his or her doubt is a reasonable one, when it made no impression on the minds of so many other jurors equally intellingent as himself or herself.

On the other hand, if the majority of the jurors are for conviction, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their own judgment, which was not concurred in by the majority.

I want you to go back to the jury room and deliberate, and endeavor to arrive at a verdict and consider the case in the light of these particular instructions.

Bear in mind, ladies and gentlemen of the jury, that some jury some time will have the duty to decide this case, and I hope that you, as the jury in this case, will be able to decide this matter. (*Fulwood* Tr. 322-323).

senting juror should consider whether his or her doubt is a reasonable one when it made no impression on the minds of the many other jurors, equally honest and equally intelligent.

On the other hand, if a majority of the jurors are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment, which was not concurred in by the majority.

I want you, therefore, tomorrow to go back to the jury room and deliberate and endeavor to arrive at a verdict, and consider the case in the light of these additional instructions.

Some jury, of course, sometime will have to decide this case, and naturally we all hope that this jury will be the jury that will decide the matter. (H. Tr. 6-7).

time will have the duty to decide this case, and I hope that you, as the jury in this case, will be able to decide this matter."[8] The Court stated:

> This statement could not reasonably have any coercive effect. It is merely a legitimate expression of a *hope* that the jury would decide the case if it could. The statement that some other jury would have to decide the case if this one could not was accurate as a generality and, in any event, could have had no coercive impact on the jury. If they already knew what would likely happen if they deadlocked, it was surplusage, if they did not know, this information, far from being coercive, would have had the effect of reducing the pressure on them to reach a verdict. 369 F.2d at 963.

This Court has repeatedly sanctioned the use of the *Allen* charge. *Kent* v. *United States*, *supra*. *Moore* v. *United States*, 120 U.S. App. D.C. 203, 345 F.2d 97 (1965). *Bord* v. *United States*, *supra*. *Coupe* v. *United States*, 72 U.S. App. D.C. 86, 113 F.2d 145, *cert. denied*, 310 U.S. 651 (1940). All Courts of Appeal have affirmed the use of the charge.[9] As recently as 1952 the Supreme Court approved the charge by implication. *Kawakita* v. *United*

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[8] Here the judge concluded in similar fashion: "Some jury, of course, sometime will have to decide this case, and naturally we all hope that this jury will be the jury that will decide the matter." (H. Tr. 7).

[9] See *Cenedella* v. *United States*, 224 F.2d 778 (1st Cir.), *cert. denied*, 350 U.S. 901 (1955); *United States* v. *Birnbaum*, 373 F.2d 250, 258-59 (2d Cir. 1967); *Shaffman* v. *United States*, 289 Fed. 370, 374-75 (3d Cir. 1923); *White* v. *United States*, 279 F.2d 740, 750 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960); *Thaggard* v. *United States*, 354 F.2d 735, 738-39 (5th Cir.), *cert. denied*, 383 U.S. 958 (1965); *United States* v. *Barnhill*, 305 F.2d 164 (6th Cir.), *cert. denied*, 371 U.S. 865 (1962); *United States* v. *Gordon*, 196 F.2d 886, 891-92 (7th Cir.), *rev'd on other grounds*, 344 U.S. 414 (1952); *Costella* v. *United States*, 255 F.2d 389, 398 (8th Cir.), *cert. denied*, 358 U.S. 830 (1958); *Kawakita* v. *United States*, 190 F.2d 506 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952); *DeVault* v. *United States*, 338 F.2d 179 (10th Cir. 1964).

States, 343 U.S. 717 (1952), *affirming*, 190 F.2d 506 (9th Cir. 1951).

The Court in *Fulwood* answered appellant's contention that an *Allen* charge is coercive of minority jurors and deprives a defendant of his right either to the unanimous verdict of twelve independent jurors or to a mistrial:

> [T]he Allen charge is a carefully balanced method of reminding jurors of their elementary obligations, which they can lose sight of during protracted deliberations. It is perfectly valid to remind them that they should give some thought to the views of others and should reconsider their position in light of those views. The charge as given here did not *require* the jury to reach a verdict but only reminded them of their duty to attempt an accommodation. While it suggests to the minority that they reconsider their position in light of a majority having a different view, it reminds them that they should not acquiesce in a verdict which does not represent their own convictions. 369 F.2d at 962.

The charge therefore serves a useful function and its use should be continued.[10]

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[10] The judge here did not inform the jury, "You have got to reach a decision in this case," a remark properly found coercive in *Jenkins* v. *United States*, 380 U.S. 445 (1965), *reversing*, 117 U.S. App. D.C. 346, 330 F.2d 220 (1964). Nor is this case analogous to *Williams* v. *United States*, 119 U.S. App. D.C. 190, 338 F.2d 530 (1964), where the charge was given after the jury had asked if the two alternate jurors could replace the minority voters. The charge was there clearly directed at a small minority of jurors who had just been publicly rebuked when their fellow jurors requested their replacement. Such coercive circumstances did not obtain here where the trial judge did not know how the jury stood numerically. Finally, here the judge did not submit to the jurors, as was done in *Green* v. *United States*, 309 F.2d 852 (5th Cir. 1962), the false proposition that the majority have better judgment than the minority.

B. *The judge properly gave the* Allen *charge here without being informed by the jury that there was a deadlock.*

Appellant argues that his motion below should have been granted because the trial judge gave the *Allen* charge without receiving a report from the jury that they were unable to agree. This Court has never stated such a prerequisite to giving the charge. To the contrary, *Kent* v. *United States*, *supra*, 343 F.2d at 261, held that it was not plain error to give the charge as part of the original instructions rendered to the jury before any deliberations. In *Coupe* v. *United States*, *supra*, after the jury had deliberated for only one hour, the trial judge recalled them and gave an *Allen* charge. This was held not error: "It is well established that a court need not wait for the jury to request more instructions, but may recall them at any time." 72 U.S. App. D.C. at 90, 113 F.2d at 149. In *Burrup* v. *United States*, 371 F.2d 556 (10th Cir. 1967), the trial judge recalled the jury and gave the charge after four hours of deliberations. Finding no error, the Court said that the charge there given was "less likely to coerce if given before the jury had indicated its inability to agree on a verdict." *Id.* at 558. In any event, we submit that after some eight hours of deliberation the judge could have concluded an inability to agree without being told so.[11]

The time of the return of the verdict in relation to when the *Allen* charge was given and the period of post-charge deliberations illustrates, if anything, the absence of a coercive effect. The charge was given after approximately eight hours of deliberations at 5:25 p.m. on June 6, 1963. The jury was then excused until 10:00 the following morning. The period of separation served to diminish any coercive effect the charge might have had. See

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[11] When the jury has actually announced a deadlock, a defendant can argue more forcefully that the charge prejudiced him because he was at least close to attaining the partial victory of a hung jury. The argument for actual coercion is stronger too when it is plain that before the charge one or more jurors have heavily committed themselves for an acquittal.

Fulwood v. *United States*, *supra*, 369 F.2d at 962. And the fact that the jury deliberated two more hours after their return indicates they were not "dynamited" by the instruction.[12]

II. Appellant should not be allowed to raise the *Allen* issue under 28 U.S.C. § 2255 when he had the opportunity to raise that issue on direct appeal from his convictions.

Appellant should be precluded from raising the *Allen* issue in his instant motion under 28 U.S.C. § 2255 under the familiar doctrine that issues which could have been raised on appeal may not be raised by collateral attack. As stated by Judge Leventhal in *Thorton* v. *United States*, 125 U.S. App. D.C. 114, 117-118, 368 F.2d 822, 825-826 (1966):

> Many opinions declare that collateral attack, as by habeas corpus, is available to correct the denial of a constitutional right. This is the general rule but it is not an absolute. These expressions do not obliterate the doctrine that the normal and customary method of correcting trial errors, even as to constitutional questions, is by appeal, and that habeas corpus cannot serve as a substitute for the regular judicial process of trial and appeal in the absence of circumstances indicating collateral attack is needed to provide an effective means of preserving constitutional rights. [Citations omitted.]
>
> . . . [W]here effective procedures are available in the direct proceeding, there is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by

[12] In *Fulwood* after some seven hours of deliberations the jury was given the *Allen* instruction at 3:50 p.m. and excused until 10:00 a.m. the next morning. The verdict was returned the next day at 10:35 a.m., after only 35 minutes of additional deliberations. The Court, however, did not attach significance to the brevity of the post-charge deliberations.

making criminal litigation interminable and diverting resources of the federal judiciary.[13]

The alleged error sought to be raised here was clearly subject to correction on direct appeal, and there was a direct appeal with representation by counsel. See *Smith* v. *United States*, 88 U.S. App. D.C. 80, 85, 187 F.2d 192, 197 (1950), *cert. denied*, 341 U.S. 927 (1951). Compare *Kenion* v. *Gill*, 81 U.S. App. D.C. 96, 155 F.2d 176 (1946). And while the court reporter did fail to transcribe the *Allen* charge and the circumstances of its use, appellate counsel, Mr. Melnicoff, was notified by appellant that such a charge had been rendered at trial and that appellant wished to object to it on appeal. After such notice counsel easily could have consulted with the court reporter and secured the missing portion of the transcript if he had thought that the charge should have been attacked. We submit then that despite the transcription failure appellant's counsel had an opportunity to raise the *Allen* issue on direct appeal. Section 2255 is not now needed to provide an effective means of preserving appellant's rights on that issue.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[13] The Court held in *Thorton* that generally a claim that evidence secured by an unlawful search and seizure was admitted at trial would not be entertained under 28 U.S.C. § 2255.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,103

Charles Scott,

Appellant,

v.

United States of America,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,103

Charles Scott,

Appellant,

v.

United States of America,

Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. THE FACT THAT APPELLANT INDICATED THAT HE HAD NOTIFIED HIS APPELLATE COUNSEL THAT AN ALLEN CHARGE HAD BEEN GIVEN AT THE TRIAL SHOULD NOT PRECLUDE COLLATERAL ATTACK ON THE ALLEN CHARGE WHERE THE CHARGE WAS OMITTED FROM THE OFFICIAL TRANSCRIPT OF THE TRIAL PROCEEDINGS.

In arguing that appellant had the opportunity to raise the Allen charge issue on appeal, appellee assumes that appellant's counsel on appeal, Mr. Melnicoff, received notice that the Allen charge was given. This assumption is subject to

grave doubt.[1/] There is no evidence that Melnicoff received such notice. In fact, when questioned in August, 1966 by appellant's appointed counsel in the court below, Mr. Melnicoff could not recall whether he knew an Allen charge had been given at appellant's trial at the time he was preparing appellant's appeal. So far as he was able to recall, he assumed that the transcripts of trial filed at the time of the appeal were completed in conformity with the Order of the Court of Appeals, which had required the furnishing of the entire transcript of proceedings exclusive of the voir dire examination and the opening statements of counsel. (Amended Motion to Vacate Judgment Set Aside Sentence and Discharge Defendant from Custody, pp. 2-5).

Even assuming arguendo that Mr. Melnicoff received notice from appellant that an Allen charge had been given at trial, this fact should not preclude collateral attack on the Allen charge. Mr. Melnicoff apparently believed that a

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1/ The Finding of Fact by the District Court that appellant's counsel, Mr. Melnicoff, received notice that an Allen charge had been given at the trial does not appear to be supported by the evidence. As indicated above, Mr. Melnicoff could not recall whether he knew about the Allen charge during the preparation of the appeal. And surely, the reference to an Allen charge in appellant's February 19, 1964 Motion for Summary Reversal cannot be considered notice as to the Allen charge in light of the absence of the Allen charge from the certified reporter's transcript.

complete transcript had been prepared in accordance with the Order of the Court of Appeals (Amended Motion, supra, pp. 5-6). He had a right to rely on the transcript, as certified by the court reporter. As pointed out in the Brief for Appellant (p. 16), the certified reporter's transcript is deemed prima facie a correct statement of the testimony taken and proceedings had, and it is the duty of the District Court to assure that the court reporter complies with the provisions of the reporting statute. Appellee has ignored these statutory and judicial authorities. In fact, appellee appears to urge the removal of the burden of enforcement of the reporters statute from the shoulders of the District Court, and the placing of this burden on counsel who has been appointed after trial to represent an indigent defendant on appeal. Appellant contends that this proposition, in addition to contradicting Poole v. United States, 102 U. S. App. D.C. 71, 250 F.2d 396 (D.C. Cir. 1957), offends the spirit of Hardy v. United States, 375 U. S. 277 (1964). The Hardy case requires that counsel appointed by the Court of Appeals to represent an indigent defendant, who was not counsel at trial, be furnished an entire transcript of the trial proceedings in order to fulfill his duty of adequate representation. This ruling was based on the fact that counsel appointed to

represent an indigent defendant on appeal is obviously unfamiliar with the proceedings at the trial, and should be given the maximum assistance in order to assure adequate representation of the defendant on appeal. Appellant contends that to deny appointed appellate counsel the right to rely on a certified transcript under the circumstances of the instant case would seriously erode the principle of the Hardy case.

II. UNDER THE CIRCUMSTANCES OF THIS CASE, THE DELIVERY OF THE ALLEN CHARGE PRIOR TO THE ANNOUNCEMENT BY THE JURY THAT THEY WERE DEADLOCKED WAS AN ABUSE OF DISCRETION WHICH PREJUDICED APPELLANT'S RIGHTS TO A FAIR TRIAL AND TRIAL BY JURY.

Appellee has failed to answer on a reasoned basis appellant's contention that the giving of the Allen charge was prejudicial under the circumstances of this case. Authorities are cited, but reasons are omitted. Appellee fails to discuss the fact that just a short period before the Allen charge was delivered the jury had requested to hear again the testimony of two purported eye-witnesses to the offenses charged against the defendant. The thrust of appellee's position on this point is that the delivery of the Allen charge is justified at any time during the jury's deliberations. Appellant urges this Court to follow the learning of Moore v. United States, 120 U. S. App. D. C. 203, 345 F.2d 97 (D. C. Cir. 1965), and take a more

cautious approach. "[S]ince the (Allen) charge is potentially coercive, its content and manner of use deserve scrutiny", 345 F.2d at 98.

After failing to discuss the merits of appellant's argument within the context of this case, appellee goes on to contend that the Allen charge is less prejudicial when it is delivered before the jury has announced that it is deadlocked, than after such announcement (Brief for Appellee, footnote 11). Appellant contends that this argument is fallacious.

When a jury announces that it is deadlocked, the jurors admit that they have exhausted their efforts to reach a reasoned unanimous verdict. In this situation, it can be argued that the jury is looking to the judge for help to tell them what to do next. In this view, it can be argued that a supplementary instruction from the judge providing guidance to the jury is proper at this time.

But, where the jury has not indicated deadlock, it must be assumed that they are exercising their essential function of reasoning among themselves to reach a unanimous verdict. When, as in this case, the jury has been deliberating for a relatively short length of time, and they have just recently

asked to see the testimony of certain witnesses, it can be reasonably concluded that the jurors are still struggling to reach a unanimous verdict through the process of intra-jury persuasion. There probably existed at this point two points of view, each being challenged by the other side in an effort to reach a correct unanimous verdict.

The reasoning process inherent in the jury system is seriously eroded when the judge, with all his influence, intrudes into this reasoning process and attaches significance to the numerical division of the jury. The jury is distracted from their effort to reach a correct reasoned verdict, and become concerned with the judge's desire for a verdict and with the significance of the fact that a numerical majority believes a certain way.

Appellant urges that the "manner of use" of this "potentially coercive" charge, if it is to be sanctioned at all, should be confined to those situations where the jury is clearly deadlocked, and obviously require further guidance from the judge. Its use should not be extended to a case like this, where there is great danger that the charge will distort the reasoning process of the jury.

III. THE TRIAL JUDGE'S INSTRUCTION TO MINORITY JURORS TO DISTRUST THEIR OWN VIEWS WAS A PREJUDICIAL EXPANSION OF THE CHARGE APPROVED IN ALLEN v. UNITED STATES.

In attempting to distinguish Green v. United States, 309 F.2d 852 (5th Cir. 1962) (Brief for Appellee, footnote 10), appellee has not only failed to distinguish the case, but rather, has clearly shown the obvious application of the reasoning of the Green case to the case at bar. Appellee states that "here the judge did not submit to the jurors, as was done in Green ... the false proposition that the majority have better judgment than the minority." (Brief for Appellee, footnote 10). It is instructive to compare the relevant portion of the charge in the Green case, supra, with that portion of the charge in the instant case.

Green	Scott
It is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority. 309 F.2d at 855.	Every juror should listen with deference to the arguments of the other jurors and with a distrust of his own or her own judgment, if he finds the large majority of the jury takes a different view of the case from that which he or she takes. H. Tr. 6.

Appellant contends that the only difference between the charge in the Green case and the charge in the instant case is that in

the Green case the proposition that the majority will have better judgment than the minority is made explicit, while in the instant case, that proposition is implicit in the judge's request that the minority jurors distrust their own judgment. The reaction of the Court to the charge in the Green case is equally applicable to the charge in the instant case:

> There is no legal rule that the majority of jurors have better judgment than the minority. There is no legal rule that the minority, merely because they are in the minority, should distrust their own judgment. Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority's views without full discussion and without the historical right of a single juror to stick to his conscientious opinions of the case. 309 F.2d at 855.

Appellant once again urges this Court to heed the caution expressed in Moore v. United States, supra, that "since the (Allen) charge is potentially coercive, its content and manner of use deserve scrutiny" 345 F.2d at 98. Appellant urges this Court to follow the reasoning of the Green case and hold that the implicit proposition that the majority has better judgment than the minority, which is contained in the admonition to minority jurors to distrust their own judgment, is a prejudicial expansion of the original charge approved in Allen v.

United States, 164 U. S. 492 (1896). The toleration extended to a similar expansion of the Allen charge in Fulwood v. United States, _____ U. S. App. D. C. _____ 369 F.2d 960 (D. C. Cir. 1967) should be withdrawn.[2/]

2/ It is interesting to note that the District Judge in the instant case, Judge Walsh, delivered the Allen charge objected to in the Fulwood case.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the Brief for Appellant, appellant respectfully requests that this Court reverse the Court below with directions to sustain appellant's motion under 28 U.S.C. §2255 to Vacate Judgment Set Aside Sentence and Discharge Defendant From Custody.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above brief was served on Mr. Frank Q. Nebeker, Assistant United States Attorney, U. S. Courthouse, Washington, D. C., this _____ day of _____, 1968.

PEYTON FORD
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,103

Charles Scott,

Appellant,

v.

United States of America,

Appellee.

PETITION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,103

Charles Scott,
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v.

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PETITION FOR REHEARING EN BANC

On May 7, 1968 this Court affirmed per curiam the decision of the trial court in refusing to grant the appellant's motion under 28 U.S.C. §2255 to set aside his 1963 conviction. This case raises for determination questions of the utmost importance, not only to this appellant but to others similarly situated.

The appellant in his brief raised three points for consideration: first, whether an improper charge to the jury in a criminal case which was not part of the record in the original appeal can be collaterally attacked by a 28 U.S.C. §2255 motion; second, whether the Allen charge is in and of itself so coercive as to minority jurors as to deprive appellant of his constitutional right to a fair trial and to a trial by

jury; third, whether, because the Allen charge is so potent a charge, it can only be utilized in limited situations, where it is ascertained that the jury is deadlocked, and indiscriminate use of the Allen charge in any other situation deprives the defendant of his constitutional right to a fair trial and to a trial by jury.

Stripped to its essentials the appellant in this case asks that this Court overrule its decision in Fulwood v. United States, 125 U. S. App. D. C. 183, 369 F.2d 960 (1966). It has been held in Thompson v. Thompson, 244 F.2d 374 (D. C. Cir. 1957) and other decisions of this Court that in order to overrule previous decisions the action of the Court of Appeals sitting in banc is ordinarily required.

In its per curiam opinion the Court did not address itself to the 2255 question nor did it subject the Allen charge to any serious scrutiny, rather the panel stated "to the extent appellant urges the invalidity of any and all Allen charges under any and all circumstances, we regard this broad proposition as precluded not only by our prior decisions but by Allen itself."

The facts of the case have been previously set forth in appellant's brief before this Court. Succinctly the appellant challenged his conviction under §2255 asserting that the charge was not proper. At the outset there is raised the

threshhold question of whether the charge can be collaterally attacked in this type of motion. There are some factual differences of opinion as to whether Court appointed counsel on direct appeal was aware that the Allen charge had been given. There is nothing in the record which would reflect that such a charge had been given and it was not until June, 1966 that it was finally determined that the charge had been given and counsel furnished a transcript of the charge.

However, at the 2255 hearing before Judge Walsh from which this appeal was taken Judge Walsh asserted that the charge given by the judge at the appellant's trial could not be collaterally attacked. This proposition is patently erroneous and the Court of Appeals should have so determined.

The purpose of 28 U.S.C. §2255 is to minimize the difficulties encountered in habeas corpus hearings by affording the same rights to the accused in another and more convenient forum. United States v. Hayman, 342 U. S. 205 (1952). Accordingly, the principles applicable to habeas corpus petitions also apply to motions under 28 U.S.C. §2255.

The Supreme Court of the United States in Wayley v. Johnston, 316 U. S. 101, (1942), set forth guidelines as to the kinds of issues that could be raised by habeas corpus petition:

> The issue here (coerced guilty plea) was appropriately raised by the habeas corpus petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. 316 U. S. at 104-105.[1]

Appellant contends that the Allen charge issue raised on this 28 U.S.C. §2255 motion falls within the "exceptional circumstances" set forth in the Wayley case, supra, and therefore should have been decided on the merits by the District Court.

First, the conviction in this case was in disregard of appellant's constitutional rights. The giving of the Allen charge in this case deprived appellant of a fair trial in violation of the Fifth Amendment of the United States Constitution and deprived appellant of his right to trial by jury in violation of the Sixth Amendment of the United States Constitution. (See pp. . . , infra.)

In its opposition to appellant's §2255 motion in the court below, the government contends that the issue of erroneous

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1/ It should be noted that the supplemental Allen charge was not included in the record on appeal from appellant's conviction and therefore was not open to consideration and review on appeal by this Court.

instructions to the jury by the trial judge is not within the scope of collateral attack pursuant to 28 U.S.C. §2255. In the cases cited by the government in support of this proposition, 2/ the courts were unable to find any violation of constitutional rights.

However, the government failed to mention those cases where the issue of erroneous instructions to the jury was considered on the merits in petitions for habeas corpus. 3/ In those cases, constitutional issues were raised and decided on the merits by the courts. Petitioners under 28 U.S.C. §2255 have the same rights as habeas corpus petitioners. United States v. Hayman, supra. The substantive scope of 28 U.S.C. §2255 is the same as that of habeas corpus. Larson v. United States, 275 F.2d 673 (5th Cir. 1960); Black v. United States, 269 F.2d 38 (9th Cir. 1959); Taylor v. United States, 201 F.2d 33 (10th Cir. 1952). It follows that the issue of erroneous instructions causing deprivation of constitutional rights may be raised by motion under 28 U.S.C. §2255.

2/ Adams v. United States, 95 U.S. App. D.C. 345, 222 F.2d 45 (D.C. Cir. 1955); Banks v. United States, 259 F.2d 318 (9th Cir.), cert. denied, 358 U.S. 885 (1956); Banks v. United States, 287 F.2d 374 (7th Cir. 1961); United States v Stevens, 260 F.2d 5[illegible] (3rd Cir. 1958).

3/ Kenion v. Gill, 81 U.S. App. D.C. 96, 155 F.2d 176 (D.C. Cir., 1946); United States v LaVallee, 279 F.2d 396 (2nd Cir., 1960); Grundler v. State of North Carolina, 283 F.2d 798 (4th Cir., 1960); United States v. Murphy, 187 F. Supp. 395 (D.C. N.D. N.Y. 1960).

Appellant contends that the second requirement set forth in Wayley v. Johnston, supra, that the writ is the only effective means of preserving appellant's rights, has been met in this case. Appellant was denied an opportunity to appeal the supplemental Allen charge given at his trial because the court reporter failed to transcribe that instruction for use in the preparation of appellant's appeal.

Appellant's attorney on appeal, Mr. Melnicoff, was entitled to a complete transcript of the trial proceedings occurring on June 6, 1963 and indeed, under Chief Judge Bazelon's order of February 21, 1964, a complete transcript was supposed to have been furnished. This is precisely the kind of case the Supreme Court of the United States was contemplating when it decided Hardy v. United States, 375 U.S. 277 (1964) (dec. January 6, 1964). There the Court held that when counsel appointed in the Court of Appeals to represent an indigent defendant was not counsel at trial, it was necessary that he be furnished an entire transcript of the trial proceedings, including the court's charge to the jury, in order to fulfill his duty of adequate representation.

Mr. Melnicoff was entitled to rely on the reporter's certification that the transcript filed on March 4, 1964 was a

complete transcript of the proceedings on June 6, 1965. The certified reporter's transcript is deemed prima facie a correct statement of the testimony taken and proceedings had, 28 U.S.C. §753(b) (1964). cf. Tatum v. United States, 101 U.S. App. D.C. 373, 249 F.2d 129 (D.C. Cir. 1957), cert. denied 356 U. S. 943 (1958), and it is the duty of the District Court to assure that the court reporter complies with the provisions of the reporting statute, 28 U.S.C. §753 (1964). Poole v. United States, 102, U.S. App. D C. 71, 250 F.2d 336 (D.C. Cir. 1957).

Since the supplemental Allen charge was not included in the transcript, appellant's counsel could not and did not raise the issue of the Allen charge before the appellate court. Even if appellant's counsel had known that the Allen charge had been given, without the transcript, the appellate court could not have determined whether that charge contained prejudicial error for the appellate court could not have had the benefit of examining the charge.

It is error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. Parrot v. United States,

314 F.2d 48 (10th Cir. 1963); Fowler v. United States, 310 F.2d 66 (5th Cir. 1962); Stephens v. United States, 289 F.2d 308 (5th Cir. 1961).

If, as the above cases hold, the failure to report a possibly prejudicial portion of the trial proceedings requires a new trial, it follows that where there is a failure to transcribe a possibly prejudicial portion of the trial proceedings, and the transcript of that portion later becomes available after appeal, that portion is a proper subject of attack in a collateral proceeding under 28 U.S.C. §2255.

Surely, this motion under 28 U.S.C. §2255 is the only effective means of preserving appellant's rights within the meaning of the Wayley case, supra. As was set forth in the statement of the case, at no time prior to the instant appeal was the Allen charge part of the transcript and before the Court of Appeals. Moreover, not until June 1966, after a special hearing, was it determined that an Allen charge was given and only then did the court reporter find the missing portion of the transcript. Here, as in the Wayley case, the facts relied on are outside the record and their effect on the judgment was not open to consideration and review on appeal. In circumstances such

as are here presented a motion under §2255 must be a proper vehicle to raise the issue, for how else can the accused bring the matter to the attention of the court.

The second issue for consideration is the validity of the Allen charge itself. With regard to the problem, the appellant suggests two alternative propositions. First that the Allen charge per se is inherently coercive and deprives the accused of a fair trial. Alternatively, if the Allen charge is not per se coercive it is such a powerful weapon that it can only be used in the limited situation that jury has indicated that it is deadlocked.

The charge complained of is similar to the charge which was approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492 (1896), although there are several expansions on the original language, which will be discussed below. In essence, the charge approved in Allen, supra, urges the minority to give due consideration to the majority opinion, stresses the importance of a verdict, and urges the jurors to listen to each others opinions.

Since the Allen case was decided, all of the Circuit Courts of Appeal have approved this type of instruction. 100 A.L.R. 2d 171, 182 (1965). However, recently there has been an

increasing dissatisfaction with the charge in the federal courts, which has been reflected in a number of sharp dissents[4] and an unhappy concurrence.[5] The highest courts in two of the states have rejected the Allen charge as coercive per se.[6]

The traditional strength of the jury system has been its independence. The jury takes its instructions on the law from the judge, but it alone determines the facts. Huffman v. United States, supra. This independence is compromised when the judge, with all the influence he carries, intrudes into the jury's deliberations and urges the minority to reconsider their doubts for the sake of reaching a verdict. As the Supreme Court said in Starr v. United States, 153 U.S. 614 (1894):

> It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. 153 U.S. at 626.

4/ Huffman v. United States, 297 F.2d 754, 755 (5th Cir.) cert. denied, 370 U.S. 955 (1962); Andrews v. United States, 309 F.2d 127, 129 (5th Cir.), cert. denied, 372 U.S. 946 (1962); Jenkins v. United States, 330 F.2d 220, 221 (D.C. Cir. 1964), rev'd, 380 U.S. 445 (1965).

5/ Thaggard v. United States, 354 F.2d 736, 739 (5th Cir.), cert. denied, 383 U.S. 959 (1966).

6/ State v. Randall, 137 Mont. 32[illegible], 353 P.2d 1054 (1960). State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959).

In cases decided since the Allen case, the Supreme Court has evidenced great concern for the possible coercive effect of the judge's communications to the jury after it has begun its deliberations. In Brasfield v. United States, 272 U.S. 447 (1926), the Court held that the trial court's inquiry as to the numerical division of the jury was ground for reversal. In so holding, the Court said:

> Its (the inquiry's) effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. 272 U.S. at 450.

It is difficult to reconcile the Brasfield case with the Allen case, which was decided 30 years earlier. It is hard to see how an inquiry as to the numerical division of the jury can be held coercive as to the minority jurors, when a direct admonition from the judge to the dissenting jurors urging them to reconsider their views in light of their disagreement with the majority, is held to be free from coercion. Appellant contends that the Allen charge is a much clearer case of judicial coercion as to minority jurors than the inquiry as to numerical division.

In Jenkins v. United States, 380 U.S. 445 (1965), the Supreme Court reversed this Court in holding that the trial court's admonition to the jury that "You have got to reach a decision in this case" was coercive. It takes a large degree of sophistication to distinguish that charge from the charge in this case. Here, the judge instructed the jury with these words:

> Some jury, of course, sometime will have to decide this case, and naturally we all hope that this jury will be the jury that will decide the matter. (H. Tr. 7).

It is submitted that a minority juror would have trouble distinguishing between the judge's command that he reach a decision and the judge's "hope" that he reach a decision. Besides being misled by the judge's false statement that some jury will have to decide this case (which will be discussed below), the minority juror is put in the uncomfortable position of frustrating the judge's "hope", as well as that of the majority of the jury. It is doubtful that the Supreme Court will long continue to draw fine distinctions between the language used, where the coercive nature of the judge's charge is substantially the same. Indeed, the charge approved in the Allen case did not contain any expression of the judge's "hope" that a verdict would be reached.

Although our political system is in large part based on the theory of majority decision, our jury system and criminal law are grounded on a different principle. A man is deemed innocent of a crime until he is proven guilty beyond a reasonable doubt in the minds of 12 of his peers. If only one of the jurors has a reasonable doubt, a verdict of guilty cannot be returned. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950).

The Allen charge impinges upon and distorts the unanimous verdict rule, which is the bedrock of our criminal law. The Allen charge urges the minority to reconsider their views in light of the majority view. Yet, there is no legal significance to the majority opinion in our criminal law. As the 5th Circuit said in Green v. United States, 309 F.2d 852 (5th Cir. 1962),

> ...[T]here is no legal rule that the majority of jurors have better judgment than the minority. There is no legal rule that the minority, merely because they are in the minority should distrust their own judgment. Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority's views without full discussion and without regard to the historical rights of a single juror to stick to his conscientious opinion on the case. 309 F.2d at 855.

The charge approved in the Allen case did not sanction advising minority jurors to "distrust" their own views, yet this statement was contained in the charge in appellant's case, and

was approved by this court in Fulwood v. United States, 369 F.2d 960, (D.C. Cir. 1967). Appellant contends that this court was wrong to approve such language in Fulwood, which language even further increases the coercive nature of the Allen charge.

Implicit in the unanimous verdict rule is the possibility of a hung jury and a mistrial. As this court said in Williams v. United States, 119 U.S. App. D. C. 190, 338 F.2d 530 (D.C. Cir. 1964), a mistrial is as much a part of the jury system as a unanimous verdict . A mistrial from a hung jury is a safeguard to liberty. Huffman v. United States, supra, under our system of conviction by unanimous verdict.

Yet, the Allen charge undermines the right to a hung jury by putting pressure on the minority juror to give in to the majority. In fact, today, judges, in their enthusiasm to obtain verdicts, go beyond the original Allen charge and mislead juries by telling them that the case will eventually be decided by some jury. This occurred in appellant's case when the trial court said that some jury, of course, sometime will have to decide this case." (H. Tr. 7). That was not a correct statement of the law. Huffman v. United States, supra, Jenkins v. United States, (D.C. Cir. 1964), supra, Indeed, that statement minimized, if it did not nullify the chance that a minority juror would exercise his

right to cause a hung jury. Such a perversion of our jury system and of the original Allen charge should no longer be tolerated.

In the cases upholding the Allen charge, there seems to be an unwritten rationale that this charge is an effective instrument of judicial administration, in that it produces verdicts that otherwise might not be brought by deadlocked juries. Appellant submits that this proposition is grossly invalid. As Judge Wisdom said, in dissenting in Andrews v. United States, supra,

> The Allen charge causes more trouble in the administration of justice than it is worth. Its time-saving merits in the district court are more than nullified by the complications it causes on appeal when the reviewing court must determine whether in the circumstances of a particular case the trial judge applied the charge properly -- in substance and in timing. 309 F.2d at 129.

Appellant contends further that the benefit to judicial administration in fewer hung juries is more than outweighed by the flood of appeals and collateral attacks on the Allen charge by outraged defendants who feel that their rights have been trampled on.

The coercive effect of the Allen charge in this case is highlighted by the speed in which a verdict was returned after the charge was given. The speed with which verdicts are reached

after the giving of the Allen charge has given rise to its nicknames: the "dynamite" or "nitroglycerin" charge. The jury had been deliberating only 6-1/2 hours before the charge was given. They were given the charge immediately prior to being dismissed until the next day; two hours after their return the next day the jury handed down its verdict. It has been stated that the fact that the jury's disagreement was of long duration before the instructions, and that the guilty verdict was reached in a relatively short time thereafter, indicated coercion. Peterson v. United States, 213 F. 920, (9th Cir. 1914); Stewart v. United States, 300 F. 769 (8th Cir. 1924).

In the Allen case supra, the Allen charge was given when the jury returned to the court for further instructions. 164 U.S. at 501. In the most recent cases in which this court has announced its approval of the Allen charge, 7/ the charge was not delivered until the jury had reported that it was deadlocked. In Moore v. United States, supra, this court cautioned that "since the charge is potentially coercive, its content and manner of use deserve scrutiny." 345 F.2d at 98.

7/ Moore v. United States, 120 U.S. App. D.C., 203, 345 F.2d 97 (D.C Cir. 1965); Fulwood v. United States, supra.

It is clear from the jury's request to hear again the testimony of two eye-witnesses to the offenses charged against the defendant that this was a close and difficult case for the jury. By their request for this testimony just a few hours before the Allen charge was delivered, it seems probable that the jurors were reasoning among themselves in an attempt to reach a verdict at the time the judge called them back for the supplemental instruction.

Assuming, arguendo, that there may be some justification for additional instructions from the court after a jury has become deadlocked, the giving of the Allen charge before such deadlock has occurred can only distort the reasoning process by stifling the views of the minority jurors, for the sake of a verdict. See Burrup v. United States, 371 F.2d 556, 559 (10th Cir. 1967) (concurring opinion).

Appellant contends that under the circumstances of this case, where the jury had just recently asked to see additional testimony, and where the jury had only been deliberating for 3-1/2 hours that the trial court abused its discretion by delivering the "potentially coercive" Allen charge. This court should confine the manner of use of this powerful weapon to

situations where it is deemed absolutely necessary -- where the jury is obviously deadlocked. Appellant contends that this is clearly not such a case.

For the reasons stated herein the appellant asks that he be granted a rehearing en banc.

Respectfully submitted,

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Attorney for Appellant
(Appointed by this Court)

[Not to be printed or submitted to West for publication]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,103

CHARLES SCOTT, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided May 7, 1968

Mr. Peyton Ford (appointed by this court) for appellant.

Mr. James E. Kelley, Jr., Assistant United States Attorney, with whom Messrs. David G. Bress, United States Attorney, Frank Q. Nebeker, Oscar Altshuler and Edward T. Miller, Assistant United States Attorneys, were on the brief, for appellee.

Before BASTIAN, Senior Circuit Judge, BURGER and McGOWAN, Circuit Judges.

PER CURIAM: This is an appeal from a denial, after hearing, of appellant's motion under 28 U.S.C. § 2255 to set aside his 1963 sentence for armed robbery. At the trial the court had, with the explicit agreement of defense counsel (who was not appellant's counsel upon this appeal), given a so-called Allen charge (Allen v. United States, 164 U.S. 892 (1896)); and it is this fact upon which appellant founds his collateral attack. The Government preliminarily urges that this issue is not available under § 2255, but we do not address ourselves to this question because of some uncertainty in the record as to whether new counsel representing appellant upon his direct appeal was fully on notice from the official transcript that an Allen charge had been given.

On the merits, the case is strikingly similar to Fulwood v. United States, 125 U.S.App.D.C. 183, 369 F.2d 960 (1966). The language of the charge is essentially the same, as are the circumstances under which it was given. 1/

1/ In both cases the Allen charge was given after some seven to eight hours of deliberation, and at the end of the afternoon, just before excusing the jury until the following morning. In this case the jury did not come in with a verdict until two hours after resuming its work the next day, as compared with 35 minutes in Fulwood.

Appellant's only purported distinction of Fulwood is that it appeared there that the jury was deadlocked, whereas here there was no visible indication of disagreement. We do not find this asserted difference persuasive. And, to the extent appellant urges the invalidity of any and all Allen charges under any and all circumstances, we regard this broad proposition as precluded not only by our prior decisions but by Allen itself.

Affirmed.